

**MADSTER AND MADSTER:
FILE-SHARING AND COPYRIGHT INFRINGEMENT AGAIN**
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The United States Court of Appeals for the Seventh Circuit has upheld the grant of a preliminary injunction against the service provider in yet another Napster-style music-file-sharing case decided on 30 June 2003. The service in question was styled “Aimster”, the “AIM” element standing for “AOL (America On Line) Instant Messaging” because the organisation made use of that service. Aimster, (whose owner is named John Deep, sounding suspiciously like these anonymous litigants of much Common Law history, John Doe and Richard Roe), was a subscription service, available for \$4.95 per month, the members of which could swap music files only when both parties to the transaction were online and connected in a chat-room enabled by an instant-messaging service. In effect the members communicated with each other by emails to which music files were attached. Once again, therefore, the service provider did not make any copies of copyright music itself, and the questions raised by the plaintiffs (between them, the owners of most subsisting copyrights in American popular music) were (1) whether Aimster could be liable for contributory or vicarious infringement, and (2) whether it had any defences under the Digital Millennium Copyright Act (DMCA).

The judgment of the Court of Appeals is an elegant exposition by the well-known Circuit Judge, Richard Posner, and focuses primarily on contributory infringement (the Court is doubtful about the relevance of vicarious infringement). At the centre of the judgment is an analysis of the video recorder case decided by the Supreme Court in 1984, *Sony Corp of America Inc v Universal City Studios Inc* 464 US 417, which held that there cannot be contributory infringement in the provision of a potentially infringing mechanism or service if the defendant lacks knowledge about, and control over, what the user does with it, and there are potential non-infringing uses as well as infringing ones.

Judge Posner holds that the encryption feature of Aimster’s service, which prevented it from knowing what files were being transferred through its system, did not mean that it lacked knowledge on infringing uses. “Wilful blindness is knowledge, in copyright law ...”. Further, the mere possibility of non-infringing uses is not enough to preclude contributory infringement. Thus in this case Aimster provided its members with an online tutorial on the use of the service, the only examples of file sharing being given there all involving the swapping of copyright music. At least in a preliminary injunction case, this was enough to shift the burden on to Aimster to show that there were, not just possible, but substantial non-infringing uses of the service.

Turning to defences under the DMCA, Judge Posner observes that “the Act provides a series of safe harbors for Internet service providers and related entities, but none in which Aimster can moor. The Act does not abolish contributory infringement. The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers’. Far from doing anything to discourage repeat infringers of the plaintiffs’ copyrights, Aimster invited them to do so, showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful

distribution of copyrighted materials disabled itself from doing anything to prevent infringement.”

Aimster also invoked the free speech clause of the First Amendment, arguing that Internet communication should only be restricted so far as absolutely necessary to protect copyright. Judge Posner referred to *Eldred v Ashcroft* 123 S Ct 769 (2003), saying that free speech protection was already embedded in copyright law and could not be superimposed upon it. In any event, the First Amendment bears less heavily when the right to copy, or to enable the copying of, other people’s music is being asserted.

The case appears to be a more extreme one than *Grokster* (not cited by Judge Posner), where injunctions were refused on the grounds of the service provider’s lack of control over the use of the service (see comment in *E-Law Review*, Issue No 11). Aimster gained its income from users via subscription, rather than through advertising, and appears to have encouraged infringing file sharing by its members much more blatantly. Judge Posner analogises the service’s techniques with aiding and abetting in the criminal law (or being art and part, as we Scots lawyers would put it), which may be seen as not entirely apt to the circumstances. The effect of the litigation appears to have been to put Aimster out of business, but Judge Posner advises that it has recently been re-named “Madster”, without explaining why. Perhaps the reader can guess. Posner also notes the irony that the service was dependent upon the chat-room facilities and encryption provided by AOL, the parent company of which (AOL Time Warner) is also the parent of many of the plaintiffs in the case such as Warner Brothers Records and Atlantic Recording Corporation.

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